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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1478

H. Ross Perot, Electronic Data Systems Corporation, duPont Glore Forgan Incorporated, William K. Gayden, Morton H. Meyerson, Milledge A. Hart, III, Margot Perot, Mervin L. Stauffer, PHM & Co., Charleston Investment Company, E. D. Systems Corporation, Daniel J. Cullen, William D. Fleming, George T. Thomson, and Charles W. Cox,

Petitioners,

against

Winthrop J. Allegaert,
as Trustee of duPont Walston Incorporated,

Respondent,

and

New York Stock Exchange, Inc., Douglas E. DeTata, John J. Doughty, Allan Blair, and D. Tipp Cullen,

Additional Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE AMERICAN STOCK EXCHANGE, INC., IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

John J. Loflin, Jr.
25 Broadway
New York, New York 10004
Attorney for Amicus Curiae
American Stock Exchange, Inc.

Lord, Day & Lord
William P. Casella
Of Counsel

307 Bar Press, Inc., 132 Lafayette St., New York 10013 – 966-3906

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Petitioners,

against

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as Trustee of duPont Walston Incorporated,

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and

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE AMERICAN STOCK EXCHANGE, INC., IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The American Stock Exchange, Inc., respectfully moves, under Rule 42(3) of the Rules of this Court, for leave to file a brief amicus curiae in support of the petition for cer-

tiorari. Counsel for the American Stock Exchange, Inc., attempted to obtain the consent of all the parties to the filing of the brief, but counsel for the respondent has denied consent.

The American Stock Exchange, Inc., is directly affected by the decision of the Court below, which expressly held a provision of the American Stock Exchange Constitution to be unenforceable in this case. As is explained more fully in the attached brief, eleven of the petitioners and additional respondents in this case, as well as the brokerage house represented by the respondent bankruptcy trustee, were members of the American Stock Exchange when the disputes in this case arose, and were required by a provision in the American Stock Exchange Constitution to submit disputes with other members to arbitration.

The American Stock Exchange, Inc., wishes to present the reasons why the decision of the Court below, holding the arbitration provision of the American Stock Exchange Constitution to be unenforceable in this case, seriously undermines the system of self-regulation of national securities exchanges that Congress established in the Securities Exchange Act of 1934.

WHEREFORE, the American Stock Exchange, Inc., prays that this motion be granted.

Respectfully submitted,

JOHN J. LOFLIN, JR.
25 Broadway
New York, New York 10004
Attorney for Amicus Curiae
American Stock Exchange, Inc.

LORD, DAY & LORD
WILLIAM P. CASELLA
Of Counsel

May 19, 1977

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Additional Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN STOCK EXCHANGE, INC., IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This brief in support of the petition for a writ of certiorari, is submitted by the American Stock Exchange, Inc., as amicus curiae. For the reasons set forth below, the American Stock Exchange, Inc., believes that the petition presents an extremely serious issue, not previously resolved by this Court, concerning the self-regulation of national securities exchanges under the Securities Exchange Act of 1934.

The Interest of the Amicus Curiae

The American Stock Exchange, Inc., is a national securities exchange registered pursuant to Section 6 of the Securities Exchange Act of 1934, 15 U.S.C. §78 f. Petitioner-defendant duPont Glore Forgan Incorporated ("DGF"), and duPont Walston Incorporated ("Walston"), a bankrupt brokerage house whose federal securities fraud claims are being asserted by the respondent-plaintiff bankruptcy trustee, were member corporations of the amicus curiae during the period covered by the complaint in this case. Ten of the other petitioners and additional respondents, including nine of the "Defendant Directors" of Walston (Complaint ¶18), were allied members of the amicus curiae ("the allied members") during that period.*

* Petitioners Morton H. Meyerson, Mervin L. Stauffer, Daniel J. Cullen, William D. Fleming, George T. Thomson and Charles W. Cox, and Additional Respondents Douglas E. DeTata, John J. Doughty, Allan Blair and D. Tipp Cullen.

Article IV, Section 1(b) of the American Stock Exchange Constitution provides that a director of a member corporation may become an allied member of the Exchange if he satisfies certain requirements and signs a pledge to abide by the Constitution and Rules of the Exchange (2 American Stock Exchange Guide (CCH) ¶9031).

As members of the American Stock Exchange, Walston, DGF and the allied members agreed to be bound by Article VIII, Section 1 of the American Stock Exchange Constitution which provides that "[m]embers . . . shall arbitrate all controversies arising in connection with their business between or among themselves . . ." (2 American Stock Exchange Guide (CCH) ¶9062).*

The Court below held that this provision of the amicus curiae's Constitution (as well as a similar provision of the New York Stock Exchange Constitution) is enforceable only with respect to disputes which the Court characterized as "mere internal brokerage industry squabble[s]", and not with respect to disputes involving "broad questions of policy" under the federal securities laws.

It will be the purpose of the amicus curiae in this brief to show that its arbitration procedures are an appropriate and necessary method of resolving disputes among its members even when those disputes involve claims under the federal securities laws, that the amicus curiae was authorized by the Securities Exchange Act of 1934 to require its members to arbitrate such disputes, and that consequently the decision below significantly impairs the amicus curiae's right to self-regulation which Congress granted in the Securities Exchange Act of 1934.

* Article I, Section 3(b) of the American Stock Exchange Constitution provides that the term "member" includes allied members (2 American Stock Exchange Guide (CCH) ¶9003).

ARGUMENT

The decision below seriously undermines the system of self-regulation of national securities exchanges established by the Securities Exchange Act of 1934.

This case raises an issue of importance to the entire securities industry and vital to national securities exchanges, namely, whether the constitution and rules of a national securities exchange can require arbitration of disputes between members of the exchange when the disputes involve claims under the federal securities laws and the Bankruptcy Act.

The decision of the Court below, that arbitration of such disputes cannot be compelled, substantially invalidates the provisions in the Constitutions of the American and New York Stock Exchanges that require arbitration of disputes between exchange members—provisions that the Second Circuit once recognized are "the most significant of the measures taken to implement the self-regulation contemplated by the 1934 Act . . . ." *Coenen* v. *R. W. Pressprich & Co.*, 453 F.2d 1209, 1215 (2d Cir.) *cert. denied*, 406 U.S. 949 (1972). The decision below is contrary to the mandate of the Securities Exchange Act of 1934, 15 U.S.C. §§78a *et seq.*, and the United States Arbitration Act, 9 U.S.C. §§1 *et seq.*, and contrary to the previous case law, which has consistently held that the provisions of the American and New York Stock Exchanges requiring arbitration of disputes between exchange members are enforceable.

The Court below apparently lost sight of the fact that the federal securities fraud claims in this case constitute a

dispute between members of the American Stock Exchange. Walston's bankruptcy trustee claims that DGF and the allied members made misrepresentations to Walston, which induced Walston to enter into the Realignment Agreements. Those claims, that the alleged misrepresentations violated Rule 10b-5 and various other anti-fraud provisions of the federal securities laws,* are claims of Walston and, as such, are subject to arbitration in accordance with Article VIII, Section 1 of the American Stock Exchange Constitution.

The claims under the Bankruptcy Act, 11 U.S.C. §§96, 107 and 110, may also be effectively, fairly and promptly decided in arbitration. Arbitration is the industry practice as evidenced by the published rules of the New York and American Stock Exchanges. Public policy is not opposed to settlement of disputes in this fashion; to the contrary, arbitration is less expensive and just as sensitive to the equities of the commercial world under the panels of experienced arbitrators as a proceeding in court. As successor in interest to Walston, a member firm of both the New York and American Stock Exchanges, the trustee requires no relief from its commitment to settle disputes with other member firms by arbitration.

The Court below also proceeded on an erroneous assumption that the arbitration procedures of the American Stock Exchange are procedurally "inappropriate" for resolving

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* Three counts allege violations of §10(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78j(b), and Rule 10b-5, 17 C.F.R. §240.10b-5; one count violations of Section 29(b) of the Exchange Act, 15 U.S.C. §78cc(b); one count violations of Section 17(a) of the Securities Act of 1933, 15 U.S.C. §77q(a); one count violations of Section 12(2) of the Securities Act, 15 U.S.C. §77l(2); and one count violations of Section 15 of the Securities Act, 15 U.S.C. §77o, and Section 20(a) of the Exchange Act, 15 U.S.C. §78t(a).

disputes involving "broad questions of policy" under the federal securities laws, even when the dispute is between exchange members. As this brief will show, arbitration pursuant to the American Stock Exchange Arbitration Rules ("the Arbitration Rules") is not only an appropriate method of resolving the types of disputes presented in this case but is, in many respects, equally effective or even preferable to an action in the federal courts.

Of primary importance is the fact that the arbitrators will be persons of experience in the securities industry. There is no possibility that the case will be decided by a jury of laymen unfamiliar with the terminology and practices in this field.* Arbitration Rules 601 and 602 require that a dispute between exchange members be decided by a panel of three or five arbitrators drawn from a list of exchange members, partners of member firms and officers of member corporations (2 American Stock Exchange Guide (CCH) ¶¶9541, 9542). Such a panel (truly a jury of the parties' peers) is certainly an appropriate forum for deciding the questions presented in this case, such as whether certain of the defendants misrepresented to the Walston Board of Directors the financial condition of DGF and of Walston (Complaint ¶54) and whether the "numerous, lengthy and complex" Realignment Agreements were "inequitable . . . to Walston and excessively favorable to the Perot Interests" (Complaint ¶50).

* For a discussion of the widespread dissatisfaction with the use of the jury in the trial of civil cases, see Justice Schaefer's address before the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice. Schaefer, *Is the Adversary System Working in Optimal Fashion?* 70 F.R.D. 159, 160 (1976).

Second, the Arbitration Rules augmented by statute can be used to compel to production of relevant documents and the appearance of witnesses. Arbitration Rule 608 provides that "[t]he arbitrators and any attorney of record in the arbitration proceeding shall have such powers of subpoena as may be provided by law" (2 American Stock Exchange Guide (CCH) ¶9548). Both Section 7 of the United States Arbitration Act, 9 U.S.C. §7, and Section 7505 of the New York CPLR authorize the issuance of subpoenas to compel production of documents and attendance of witnesses. This procedure, in which document demands are either made by the tribunal or closely supervised by it, can hardly be said to be inappropriate in complex litigation. It does not differ essentially from the procedure recommended by the *Manual For Complex Litigation.**

Third, the American Stock Exchange Constitution provides (Article VIII, Section 4) that the decision of the arbitrators is final and not subject to protracted appeals (2 American Stock Exchange Guide (CCH) ¶9065).

Despite the advantages of arbitration to the parties to the dispute, the Court below reasoned that the "public interest" is better protected by a trial in the federal courts ". . . where a complete record is kept of the proceedings and findings and conclusions are made . . . ." This position

* *See* Section 1.10 of the *Manual For Complex Litigation* (1973): "The Federal Rules of Civil Procedure contemplate that discovery in the ordinary case will be directed by counsel with infrequent intervention by the judge when counsel are unable to agree. This usual pattern, however, may be ineffective in complex cases if they are to be processed expeditiously. Both the bench and bar have long been in nearly unanimous agreement on the fundamental principle that a complex case must be managed by a judge with a firm hand."

claims too much. Civil disputes do not usually contain elements of such basic public importance that resolution in a public forum is required. Settlements of civil cases could not be encouraged as they are if the outcome required public court action. Most private disputes can be resolved privately—by settlement or by arbitration. The decision below implicitly casts suspicion on arbitration as a means of resolving any significant dispute. This seems unwise and is not supported by precedent or any clear public policy.

In short, there is nothing "inappropriate" about the members of the American Stock Exchange agreeing that disputes among themselves, including disputes involving allegations of fraud under the federal securities laws, will be resolved by arbitration. Furthermore, Section 28(b) of the Securities Exchange Act of 1934, 15 U.S.C. §78 bb(b), and Section 2 of the United States Arbitration Act, 9 U.S.C. §2, guarantee the right of the members of the American Stock Exchange to make such an agreement.* That agreement is embodied in Article VIII, Section 1 of the American Stock Exchange Constitution, which the courts, prior to the decision below, have consistently held enforceable in disputes between exchange members, even when the disputes involve claims under the federal securities laws. *See e.g., In re Revenue Properties Litigation Cases,* 451 F.2d 310 (1st Cir. 1971), *Axelrod & Co.* v. *Kordich, Victor & Neufeld,* 451 F.2d 838 (2d Cir. 1971). *Coenen* v. *R. W. Pressprich & Co.,* 453 F.2d 1209 (2d Cir.), *cert. denicd,* 406 U.S. 949 (1972); *Brown* v. *Gilligan, Will & Co.,* 287 F. Supp. 766 (S.D.N.Y. 1968).

* This point is discussed more fully in the Petition for Certiorari, pages 19-21, and in the Brief of Respondent New York Stock Exchange, Inc., In Support of Petition.

Conclusion

For the foregoing reasons, the petition should be granted and a writ of certiorari should be issued to review the decision below.

Respectfully submitted,

JOHN J. LOFLIN, JR.
25 Broadway
New York, New York 10004
Attorney for Amicus Curiae
American Stock Exchange, Inc.

LORD, DAY & LORD
WILLIAM P. CASELLA
Of Counsel

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